STATE OF MICHIGAN

COURT OF APPEALS

KENNETH C. ZMUDZINSKI and SALLY A. ZMUDZINSKI,

Plaintiffs-Appellees,

v

CASSOPOLIS AREA UTILITIES AUTHORITY,

Defendant-Appellant,

and

JOHN DOE, JANE DOE, RONALD FRANCIS, GENE DECKER, RONALD BASS, LARRY BALOK, MIKE SEEDORF, DEAN HASS, MEG CLUCKY, and BALKEMA EXCAVATING INC.,

Defendants.

UNPUBLISHED
September 25, 2014

No. 315396
Cass Circuit Court
LC No. 12-000174-NZ

Before: FITZGERALD, P.J., and SAWYER and SHAPIRO, JJ.

PER CURIAM.

In this action for damages arising from a sewage overflow onto plaintiffs' residential property, defendant Cassopolis Area Utilities Authority (CAUA) appeals as of right the order denying CAUA's motion for summary disposition under MCR 2.116(C)(7). We reverse and remand for entry of summary disposition in CAUA's favor.

Appellate review of a motion for summary disposition is de novo. *Poppen v Tovey*, 256 Mich App 351, 353; 664 NW2d 269 (2003). The applicability of governmental immunity and exceptions to governmental immunity are also questions of law reviewed de novo. *County Road Ass'n of Michigan v Governor*, 287 Mich App 95, 117-118; 782 NW2d 784 (2010).

Under MCR 2.116(C)(7), summary disposition is appropriate if the claims are barred by governmental immunity. *Odom v Wayne Co*, 482 Mich 459, 466; 760 NW2d 217 (2008). To survive such a motion, the plaintiff must allege facts justifying the application of an exception to governmental immunity. *Fane v Detroit Library Comm*, 465 Mich 68, 74; 631 NW2d 678 (2001). The contents of the plaintiff's complaint are accepted as true unless contradicted by the moving party's documentation. *RDM Holdings, Ltd v Continental Plastics Co*, 281 Mich App

678, 687; 762 NW2d 529 (2008). Although documentary support is not required, a party moving for summary disposition under MCR 2.116(C)(7) has the option of supporting his or her motion with affidavits, depositions, admissions, or other documentary evidence, provided that the substance or content of the supporting proofs is admissible as evidence. *Petipren v Jaskowski*, 494 Mich 190, 201; 833 NW2d 247 (2013). When documentary evidence is provided, it must be considered in a light most favorable to the nonmoving party. *RDM Holdings, Ltd*, 281 Mich App at 687. Where a factual dispute exists, summary disposition under MCR 2.116(C)(7) is not appropriate. *Zwiers v Growney*, 286 Mich App 38, 42; 778 NW2d 81 (2009). However, "[i]f the facts are not in dispute and reasonable minds could not differ concerning the legal effect of those facts, whether a claim is barred by immunity is a question for the court to decide as a matter of law." *Poppen*, 256 Mich App at 354.

Under the Governmental Tort Liability Act, MCL 691.1401 *et seq*., "governmental agencies are immune from tort liability when engaged in a governmental function." *Nawrocki v Macomb Co Rd Comm*, 463 Mich 143, 156; 615 NW2d 702 (2000). As the Michigan Supreme Court has explained, the immunity from tort liability provided by MCL 691.1407 "is expressed in the broadest possible language—it extends immunity to all governmental agencies for *all* tort liability whenever they are engaged in the exercise or discharge of a governmental function." *Id*. (emphasis in original). Exceptions to this broad grant of governmental immunity must be narrowly construed. *Id*. at 158.

Among the statutory exceptions to governmental immunity is the sewage disposal system event exception created by MCL 691.1416 through MCL 691.1419. Under this exception: "A governmental agency is immune from tort liability for the overflow or backup of a sewage disposal system unless the overflow or backup is a sewage disposal system event and the governmental agency is an appropriate governmental agency." MCL 691.1417(2). As detailed in MCL 691.1417(2) and (3), there are several criteria a claimant must satisfy in order to bring a claim under these exceptions. We have previously summarized these elements as follows:

> (1) that the claimant suffered property damage or physical injuries caused by a sewage disposal system event;
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> (2) that the governmental agency against which the claim is made is "an appropriate governmental agency," which is defined as "a governmental agency that, at the time of a sewage disposal system event, owned or operated, or directly or indirectly discharged into, the portion of the sewage disposal system that allegedly caused damage or physical injury";
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> (3) that "[t]he sewage disposal system had a defect";
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> (4) that "[t]he governmental agency knew, or in the exercise of reasonable diligence should have known, about the defect";
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> (5) that "[t]he governmental agency, having the legal authority to do so, failed to take reasonable steps in a reasonable amount of time to repair, correct, or remedy the defect";

> (6) that "[t]he defect was a substantial proximate cause of the event and the property damage or physical injury";
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> (7) "reasonable proof of ownership and the value of [any] damaged personal property"; and
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> (8) that the claimant provided notice as set forth in MCL 691.1419. [*Linton v Arenac Co Rd Comm*, 273 Mich App 107, 113-114; 729 NW2d 883 (2006) (footnotes omitted).]

A plaintiff must satisfy all of these requirements to survive a motion for summary disposition on governmental immunity grounds. *Willett v Charter Twp of Waterford*, 271 Mich App 38, 50, 52, 55; 718 NW2d 386 (2006).

In this case, in moving for summary disposition, CAUA has challenged plaintiffs' ability to satisfy several of these criteria. In particular, CAUA maintains that there was no evidence that a "sewage disposal system event" occurred within the meaning of MCL 691.1417(k). A sewage disposal system "event" generally refers to "the overflow or backup of a sewage disposal system onto real property." MCL 691.1416(k). However, the statute also expressly provides that such an overflow is not a sewage disposal system event if "a substantial proximate cause" of the overflow was an "obstruction in a service lead that was not caused by a governmental agency," a "connection to the sewage disposal system on the affected property, including, but not limited to, a sump system, building drain, surface drain, gutter, or downspout," or an act of war or terrorism. MCL 691.1416(k). For purposes of this provision, a "substantial proximate cause" refers to "a proximate cause that was 50% or more of the cause of the event and the property damage or physical injury." MCL 691.1416(*l*).

In this case, plaintiffs alleged the occurrence of a sewage overflow event. However, plaintiffs have failed to provide support for this allegation so as to establish a material question of fact warranting a trial. That is, while plaintiffs have alleged the occurrence of a sewage overflow event as the phrase is defined by statute, this assertion has been contradicted by the expert opinion of CAUA's expert, Thomas Deneau. According to Deneau's analysis of the situation, there are three possible explanations for the overflow, including the possibility that the overflow was caused by an obstruction in plaintiffs' service lead and/or their sump pump. Deneau explained that the long sag visible in a video of the pipe could have led to the accumulation of sewage in the lateral pipe, resulting in a plug or partial obstruction which could have been flushed out into the main line when the water was turned back on in plaintiffs' home on the evening before, ultimately causing a blockage in the main sewer line. He found specific factual support for his theory in the stains around the entire interior circumference of the lateral pipe which was indicative of a longstanding clog of some type. That is not to say that CAUA has definitely established the cause of the incident by virtue of Deneau's testimony. On the contrary, while acknowledging several possible explanations, Deneau has opined, based on his analysis of the undisputed facts, that ultimately it is impossible to determine the cause of the overflow.

To offset Deneau's opinion, plaintiffs have in turn endeavored to establish a material question of fact by countering Deneau's expert opinion with that of their own expert, Justin

Longstreth. However, a material question of fact is not created simply because a party produces an expert in support of its position. See *Amorello v Monsanto Corp*, 186 Mich App 324, 331; 463 NW2d 487 (1990). On the contrary, an expert's testimony must be admissible, see *id.*, and it must be supported by more than mere conjecture and speculation, see *Karbel v Comerica Bank*, 247 Mich App 90, 98; 635 NW2d 69 (2001). See also *Bennett v Detroit Police Chief*, 274 Mich App 307, 319; 732 NW2d 164 (2006). In this regard, "conjecture is simply an explanation consistent with known facts or conditions, but not deducible from them as a reasonable inference." *Karbel*, 247 Mich App at 98. To distinguish reasonable inference from impermissible conjecture in the context of deciding a motion for summary disposition, it has been explained that:

> "[A] conjecture is simply an explanation consistent with known facts or conditions, but not deducible from them as a reasonable inference. *There may be 2 or more plausible explanations as to how an event happened or what produced it; yet, if the evidence is without selective application to any 1 of them, they remain conjectures only*. On the other hand, if there is evidence which points to any 1 theory of causation, indicating a logical sequence of cause and effect, then there is a juridical basis for such a determination, notwithstanding the existence of other plausible theories with or without support in the evidence. [*Id.* at 98, quoting *Skinner v Square D Co*, 445 Mich 153, 164-165; 516 NW2d 475 (1994) (emphasis in original).]

"In other words, we cannot permit the jury to guess." *Karbel*, 247 Mich App at 98 (citation omitted).

Longstreth's opinion in this case was that, following a sewer incident in September, 2011, Bentonite and other foreign materials remained in the main sewer line and/or continued to seep out of a broken lateral which had been repaired by Balkema Excavating, Inc (BEI). He opined that, over time, other matter accumulated on these substances leading to a blockage in the main line which resulted in the overflow. Considering Longstreth's testimony and his affidavit, we conclude, however, that his opinions amount to nothing more than speculation and conjecture, insufficient to create a material question of fact. This is so because Longstreth's opinion is based not on the evidence, but on assumptions without support in the factual record.

For example, Longstreth has assumed that the sewer main was not cleaned properly by the Department of Public Works (DPW) in September. He has likewise assumed that materials remained in the broken lateral even after it was flushed by BEI and that those materials continued to enter the main line after the lateral was repaired by BEI. He further assumed that those materials became lodged in the sewer main near the Zmudzinskis' lateral. For example, during his deposition, he testified as follows:

> *Q.* And I believe you indicated earlier that you really have no information that the pipe wasn't totally cleaned, do you?
>
> *A.* I don't know that, no.
>
> * * *

Q. That's pure assumption on your part that they [BEI] did not do their job correctly; right?

A. Yes and no. I guess it is an assumption that there were still materials left in the lateral that came and flowed out of the lateral after they had cleared the blockage.

Q. And we kind of talked about that, and you testified that you don't know flow rates or solubility of bentonite; correct?

A. That's correct.

Q. And so you have no way of knowing that anything flowed from the lateral to the main—

A. Correct.

Q. –after it was cleaned--after the main was cleaned; correct?

A. Correct.

Q. So again, that statement, "Foreign materials accumulate on the pipe bottom," is an assumption that you make?

A. Yes.

Q. You have no independent knowledge or information to verify that?

A. Correct.

As these exchanges demonstrate, Longstreth's assumptions are unsupported by the evidence. Indeed, every indication from witnesses was that the sewer was flowing properly after the jetting process of the main line on September 10, 2011. Similarly, all available information indicated that BEI workers did not see any additional materials in the broken lateral when they repaired it, that they flushed the lateral pipe, and that, after this flushing, both the lateral and main line appeared to be flowing properly. In short, contrary to Longstreth's assumptions, all the evidence indicates that the lateral line and main line were flowing properly after the September incident and there is no basis on which to conclude that materials remained in the pipes.

Longstreth has further assumed that solids normally entering the sewer accumulated on the foreign materials that he assumed were present in the pipes. He offers this theory without providing any basis to establish how long such a process would take or whether the conditions in the pipes at issue were conducive to such an occurrence, as his deposition testimony revealed:

Q. And when you say "adhere over time," is that just on the bottom of the pipe?

A. I think eventually - - it would probably start at the bottom, and then over time as the solids accumulate they would grow to the sides.

Q. And when you say "over time," what time period are talking about?

A. It really varies. Some waste streams have more solids than others. A lot of it depends on the flow rates and how much water is moving past. It really could vary.

While acknowledging such accumulation would "vary," he provided no evidence in regard to the amount of matter that would need to enter the sewer to establish the blockage experienced in November, 2011, or whether such volume could be expected during the off-season, when he conceded there would be less matter entering the system. Further, he speculated that accumulation may have been helped by reduced flow rates during the off season, but he did not ascertain what those flow rates were in the sewer in question or whether they were consistent with his theory.

Most troublesome, there is simply no evidence that the blockage in November was comprised of Bentonite or the other debris Longstreth assumed had made its way into the main line, a fact which Longstreth conceded:

Q. And I'm trying to make sure I understand your opinion. My understanding is, you believe that there was a blockage in November downstream of the Zmudzinski's lead?

A. Yes.

Q. But I think you've also testified here today you don't know what that blockage was?

A. That's correct.

Q. But you don't have any way to know that?

A. Correct.

Considering the factual record, it does not appear that even a single witness has indicated that foreign substances were present in the sewer in November. On the contrary, a DPW employee involved with jetting the blockage indicated that all he could see was gushing liquid, consistent with sewer water. The lack of evidence on the presence of Bentonite or other debris in the sewer stands in stark contrast to the September blockage where, for example, Bentonite and sand were observed on the jetter. Ultimately, on the facts of this case, to assume, without basis in any of the available evidence, that Bentonite and other debris remained in the pipe and/or continued to enter the pipe through the broken lateral and to further assume that waste material built-up around this accumulated debris to cause a blockage, which in turn led to the Zmudzinskis' overflow, is an exercise in conjecture. Cf. *Karbel*, 247 Mich App at 104.

Added to Longstreth's speculation about the presence of foreign materials in the sewer line is his speculation as to the source of the water involved in the overflow. He posits that the

water dumped into the sewer by the DPW employees *could* have accounted for the water found in the Zmudzinskis' home. But, he does not discount the possibility that the water softener in the home could have been a contributing source of water and he stated at his deposition that the natural flow of the sewer could also have added up over time. In short, there are multiple possible sources of water, Longstreth appears to prefer one option, and yet he has provided no reason for selecting among them so as to attribute the water involved with the overflow to the vactor truck in particular. On these facts, for a jury to attribute 50 percent of the damage to the DPW's dumping of liquids in the sewer would be nothing but a guess, and a jury cannot be allowed to guess. See *Karbel*, 247 Mich App at 98.

On the whole, Longstreth's possible explanation, which "is, at best, just as possible as another theory," is insufficient to raise a material question of fact so as to overcome CAUA's motion for summary disposition. See *id*. at 107, quoting *Skinner*, 445 Mich at 164. Instead, as Deneau concluded, it appears there are several plausible explanations, but the cause of the overflow cannot be ascertained. See *id*. On the facts of this case, the Zmudzinskis have failed to establish the existence of a genuine issue of material fact on the question of whether an "event" occurred within the meaning of the exception.

As a related matter, the Zmudzinskis' were also required to show that the "sewage disposal system had a defect" and that "[t]he defect was a substantial proximate cause of the event and the property damage or physical injury." MCL 691.1417(3)(b), (e). Given our analysis above and the fact that the cause of the overflow appears essentially unknowable in this case, the Zmudinskis will also not be able to establish any defect in the sewage disposal system was a substantial proximate cause of their property damage.

Given the speculative nature of Longstreth's explanation of events, it also cannot be said that CAUA "knew, or in the exercise of reasonable diligence should have known, about the defect." MCL 691.1417(3)(c). There is no indication that CAUA had actual knowledge of the November blockage. Instead, the Zmudzinskis have argued that CAUA should have known about the blockage in the main line by videotaping the pipes following the September incident. However, as already observed, any connection between the September event and the Zmudzinskis' overflow more than two months later is entirely speculative. There is no evidence that the blockage in November consisted of the Bentonite and other debris that Longstreth has assumed remained in the pipes following the September incident. Consequently, there is no basis for assuming that CAUA should have known about the blockage.

Lastly, the Zmudzinskis have also failed to show that CAUA, "having the legal authority to do so, failed to take reasonable steps in a reasonable amount of time to repair, correct, or remedy the defect." MCL 691.1417(3)(d). The undisputed facts show that as soon as the DPW received the call about the Zmudzinskis' overflow they responded to the home and cleared the blockage in short order. There is no basis on which to conclude that CAUA failed to take reasonable steps in a reasonable time to remedy the defect. The Zmudzinskis' claims to the contrary once again rest on the notion that the defect was actually residual materials from the September incident that CAUA failed to properly address. But again, any link between the September incident and the November overflow is a matter of mere speculation.

Moreover, every indication is that the DPW responded reasonably in September, devoting considerable time to clearing the blockage and ensuring proper flow was returned to the sewer. The Zmudzinskis' claims to the contrary rest primarily on the contention that someone should have videotaped the pipes after the BEI flushed the lateral to ensure no Bentonite or other possible debris remained. But, in offering this opinion, Longstreth could point to no standard that requires such a practice. He conceded that it was his own personal viewpoint, not an industry standard, and that he had never been involved with a sewer repair. On this testimony, there is no basis to conclude that CAUA failed to take reasonable steps in a reasonable time to remedy the September defect and, thus, even supposing some connection, the Zmudzinskis' claim must fail.

Overall, the Zmudzinskis have failed to satisfy or show that a genuine issue of material fact exists with regard to whether they can satisfy all the requirements of MCL 691.1417 and, consequently, the trial court erred in denying CAUA's motion for summary disposition under MCR 2.116(C)(7). *Willett*, 271 Mich App at 55.

Reversed and remanded for entry of summary disposition in CAUA's favor. We do not retain jurisdiction.

/s/ E. Thomas Fitzgerald
/s/ David H. Sawyer